NO. 22193

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN L. SULLIVAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTION AND STATEMENT OF THE CASE

This is an appeal from a judgment of conviction on two counts of a four count indictment which was returned by the Federal Grand Jury for the Southern District of California, Central Division, on December 14, 1966 [C. T. 2-6]. [1]

Each count alleged a violation of Title 26, United States Code, Section 7201, wilful attempt to evade and defeat income tax for the years 1961, 1962, 1963 and 1964, respectively.

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[1] C. T. refers to Clerk's Transcript of Record.

On January 16, 1967, a motion to suppress evidence was filed by appellant. Hearing on the motion was held on June 6, 1967 [R. T. 73]. [2] The motion was held in abeyance by agreement of the attorneys for appellant and appellee [R. T. 100].

On June 6, 1967, a jury trial commenced before the Honorable Jesse W. Curtis, United States District Judge [R. T. 102]. On June 8, 1967, the government rested its case-in-chief and appellant moved for a judgment of acquittal [R. T. 494], which motion was taken under submission [R. T. 496]. The motion was renewed at the close of all evidence and denied by the court after jury verdict on June 14, 1967 of Not Guilty on Counts One and Two, and Guilty on Counts Three and Four [C. T. 56, 57]. Appellant's motions to set aside the verdict and for judgment of acquittal or new trial were denied [C. T. 60, 70].

On July 28, 1967, appellant was sentenced to a term of imprisonment for two years, execution of which was suspended and appellant placed on two years probation on condition he serve thirty days in a "jail-type" institution [C. T. 80].

Appellant filed a timely notice of appeal, and is at liberty on appeal bond [C. T. 101].

Jurisdiction of the District Court was predicated on Title 26, United States Code, Section 7201. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

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[2] R. T. refers to Reporter's Transcript of Proceedings.

II

STATUTE INVOLVED

Title 26, United States Code, Section 7201 provides in pertinent part:

> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and upon conviction thereof shall be fined not more than ten thousand dollars ($10,000) or imprisoned not more than five years, or both, together with the cost of prosecution."

III

STATEMENT OF FACTS

Appellant was employed as the Executive Chef of the Gourmet Restaurant in the Disneyland Hotel since approximately 1957 [R. T. 139]. This is a position of great responsibility with supervision of over 100 employees [R. T. 151]. Of primary importance to the issues in this case is the fact that with minor limitations appellant had the responsibility for buying the foodstuffs for the restaurant and more importantly, discretion to pick and choose the supplier or purveyor of these foodstuffs [R. T. 152]. During the indictment years the sole source of income reported by appellant was the salary received by virtue of his position [R. T.

130].

The evidence established that for the indictment years appellant received additional unreported taxable income from at least six purveyors. This taxable income was paid by the purveyors for the business which they had received and were to receive from the appellant in his capacity as buyer for the Gourmet Restaurant. The proof [Ex. 72] established the following income:

	Reported	Corrected
Taxable Income 1960	$ 7,332.36	$14,440.26
Taxable Income 1961	$ 7,806.45	$15,117.01
Taxable Income 1962	$ 6,952.66	$14,996.12
Taxable Income 1963	$ 8,708.17	$14,758.08
TOTAL	$30,799.64	$59,321.47
Income Tax 1960	$ 1,759.70	$ 4,466.92
Income Tax 1961	$ 1,901.94	$ 4,784.99
Income Tax 1962	$ 1,645.80	$ 4,728.18
Income Tax 1963	$ 2,200.77	$ 4,616.30
TOTAL	$ 7,508.21	$18,596.39

The method of proof utilized in this case was the specific items method concerning payments received from certain purveyors as follows:

1. Harry Phillips of Phillips Poultry testified to his payments of money to appellant. These financial transactions started in about 1957 [R. T. 168]. Initially appellant requested

[illegible]

[illegible]

[illegible]	[illegible]	
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]

[illegible]

[illegible]

loans from Mr. Phillips and in fact in those early years made some minimal repayments. With the passage of time, however, appellant no longer made requests for money nor were there any conversations at all concerning the payments. Instead a pattern developed of payments by Mr. Phillips with a degree of regularity which approximated the business that Phillips Poultry was receiving in orders of merchandise from appellant [R. T. 196, 198]. Mr. Phillips had sole responsibility for the amount of the payments and utilized as criteria approximately 30 cents per case of eggs and approximately 3% for the remaining business [R. T. 218]. He mailed these payments approximately once a month to appellant. As Mr. Phillips made clear, this method of payment commenced in 1960 and there was no illusion of repayment [R. T. 216]. The payments were given solely in "appreciation of business" and in lieu of salesmen's commission [R. T. 228].

It is to be noted that the Government's computations of unreported taxable income include only those payments starting with the period of time when there was no longer any illusion of the existence of a possibility of loans. All prior payments made under the "guise of loan transactions" were eliminated from consideration in the indictment.

2. Dean Flanagan was sales manager of Royal Prime Steer in the year 1959, when he had his first contact with the appellant. Mr. Flanagan testified to a meeting wherein the appellant referred to the fact that salesmen usually receive approximately 3% of the gross purchases and it is not always

necessary to have salesmen for this type of transaction [R. T. 375]. Mr. Flanagan stated that this was a matter which would have to be discussed with his employers and shortly thereafter Royal Prime commenced payments to the appellant. Approximately once a month Mr. Flanagan would receive from Mr. Holman, the bookkeeper [R. T. 378], a sum of cash which constituted 3% [R. T. 361] of the gross sales to Gourmet Restaurant which was delivered by Mr. Flanagan to the appellant [R. T. 374]. This procedure continued until the last indictment year when Mr. Flanagan who had by then acquired voting control of the company handled the matter by paying to appellant the proceeds of a bonus check Flanagan had received from Royal Prime Steer [Ex. 60, R. T. 380]. Thereafter Mr. Flanagan,who disapproved of this type of practice,stopped making payments to appellant [R. T. 403]. It is interesting to note that concurrently appellant ceased ordering merchandise from Royal Prime Steer [R. T. 382].

The only "evidence" which the appellant produced at trial to support his contention that these payments were loans, part of which were repayed to Mr. Flanagan is a counter check. The proceeds of this check were assertedly given to Mr. Flanagan. However, Mr. Flanagan did not enter the bank or endorse the check [R. T. 748-50]. No explanation was given as to why appellant used such a counter check, payable only to the maker, instead of writing a personal check or using one of the blank checks which banks keep on hand.

3. Appellant also received sums of money from the

Coast Poultry Co., also a supplier. These sums of money were paid to appellant by George Cinquini, the owner of Coast Poultry, who was deceased at the time of trial. The payments from Coast Poultry were in two forms, a series of checks payable to the appellant which were covered by a series of five notes of indebtedness totalling $3,900 [R. T. 243]. The balance of payments to appellant were checks drawn on Coast Poultry business account and charged on the books and records to "Purchases and Commissions" [R. T. 713]. Those payments covered by the five notes were not included in the Government's computations or charge of unreported income. It is to be noted that the collection on the notes had not been made and the notes were uncollectible at the time he was first contacted by IRS agents since barred by the statute of limitations. However, following appellant's being contacted by Internal Revenue Agents [R. T. 419] relative to his failure to pay tax on kickbacks and being informed by other sources that he was under investigation for income tax evasion, appellant signed some of the notes reinstating their collectibility [R. T. 254].

4. In 1963, according to the testimony of Louis Johnstone [R. T. 520], Southern California Trading Company found itself saddled with a very large amount of lobster. Hard pressed to dispose of the lobster, Mr. Johnstone recruited several chefs, including appellant, as salesmen [R. T. 524]. As a result of appellant's efforts in this regard, he received a check for $225 (Ex. 45). This amount was not reported on appellant's return for

that year. Mr. Robert Joyce, president of Southern California Trading stated that this definitely was not a loan [R. T. 282] or a gift [R. T. 297]. Following this transaction, Mr. Johnstone introduced appellant to Mr. Joyce at the Chevy Chase Country Club [R. T. 528]. Thereafter, Joyce "loaned" appellant $1,000 for which a note was taken back (Ex. D). It was marked paid. The $1,000 was recorded on the company notes receivable ledger, then crossed off mysteriously, to reappear in the sales ledger credited to "disct" [R. T. 283]. The change was made after Mr. Joyce had left his job [R. T. 294].

5. Albert R. Hazen, accountant for the Douglas Brothers Produce Company, a purveyor, testified that $3,200 paid to appellant in checks from Douglas Brothers (Ex. 49-52) had been entered on the company books as a bad debt write-off [R. T. 330]. Nick Douglas, one of the principals of Douglas Brothers, refused to answer questions about payments to appellant, claiming the privilege against self-incrimination [R. T. 501].

Furthermore, in the years 1962 through 1965, appellant owned no car [R. T. 633]. Instead, he drove a car which was furnished him by Douglas Brothers Produce, and which was at all times the property of Douglas Brothers [R. T. 627]. In the year 1963, however, appellant took a depreciation deduction on the car. This was admitted to by appellant under oath in the course of the trial [R. T. 636].

6. Appellant also received substantial sums from the Ratner Brothers Meat Company, who were suppliers. Beatrice Ebeling,

bookkeeper testified that payments were made to appellant in 1961 (Ex. 32) which were recorded as "food consultant fees" [R. T. 267] at the instruction of Mr. Morris Ratner [R. T. 271]. Such food consultant fees were paid for expert advice on such matters as cutting techniques, portion control, etc. [R. T. 272]. Clearly this is taxable compensation for a service.

Other payments were made to appellant which totaled $12,000 (Ex. 36, 38-44) by Mr. Morris Ratner personally. Mr. Ratner was called as a witness of the court, for the reason that the Government was unwilling to vouch for his credibility. Mr. Ratner testified that the money was always in the form of loans. It was always in cash, and notes were not taken for the "loans". Appellant testified that he had known Ratner for some time, but admitted that the relationship had lapsed. It had been renewed at the time appellant began his purchasing duties [R. T. 586]. He also stated that he was required to pay back each "loan" before a new one was granted. This was impeached when it was demonstrated that in a three week period in 1961, three "loans" had been made totalling $850 [R. T. 319].

These payments were part of a pattern which was utilized by appellant apparently as a means of securing funds for his admittedly uncontrollable gambling habit [R. T. 575]. A compelling motive for the purveyors to attempt to camouflage the payments, which were in fact kickbacks has been suggested: Such payments are prohibited under heavy penalty by federal law, 7 U. S. C. 181, with respect to most of the payors.

This pattern of payments existed well prior to 1959. For example, appellant testified [R. T. 674, 187, 689] that he had gotten "loans" from Douglas Brothers Produce, George Phillips and Morris Ratner from 1957 on. The loans from Ratner were assertedly each paid before another was granted. The others were repaid "spasmodically" [R. T. 676]. Mr. Ratner testified that such loans were made on a more or less monthly basis [R. T. 318]. The Government, however, impeached this assertion by demonstration that in one three week period in 1961 three payments totalling $850 had been made to appellant [R. T. 319].

Notwithstanding this testimony, a sworn statement was introduced into evidence, used in 1959 to support a petition in bankruptcy (Ex. 61) in which appellant listed no past debts or payments to any purveyor, including those in question [R. T. 700-703]. Appellant confirmed that he did in fact make this damaging omission [R. T. 707]. According to appellant, the reason why he filed bankruptcy was because he was unable to satisfy a $5,000 judgment rendered against him as a result of an auto accident.

Appellant's response to this demonstrated pattern of payments from individuals who he knew in a business context only was to make a number of bare assertions attacking the integrity of the payors [R. T. 269] especially Mr. Dean Flannagan. It was alleged that Mr. Flanagan was in fact repaid, but that he kept the money and used it to buy control of Royal Prime Steer [R. T. 815]. In addition, a witness was produced who stated that he was a "meat man", and that Mr. Flanagan's reputation is "bad". No

factual support for this conclusion was given [R. T. 752]. Likewise without factual support, another witness appeared who testified that Mr. Flanagan could not be taken at his word [R. T. 755].

IV

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN RESERVING RULING ON APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF THE GOVERNMENT'S CASE-IN-CHIEF.

At the close of the Government's case, appellant moved for a judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure (18 U. S. C. A.) on the theory that the Government had failed to make a prima facie showing that appellant had wilfully and with specific intent to do so evaded payment of income tax in violation of 26 U. S. C. 7201 (1964), citing Spies v. United States, 317 U. S. 492 (1942); Holland v. United States, 348 U. S. 121 (1954). The court did not rule forthwith on the motion, but announced that the motion would stand submitted [R. T. 496].

Appellant contends that it was incumbent on the court to rule on the motion, and that its reserving judgment was reversible error, following his particular interpretation of Jackson v. United States, 250 F. 2d 897 (5th Cir. 1958).

Rule 29 creates the right in federal criminal defendants to

make a motion for judgment of acquittal either at the close of the government's evidence or at the close of all evidence. There is no express language in Rule 29 forbidding the court from reserving judgment when the motion is made at the close of the government's evidence, and such reservation is expressly permitted when motion is made at the close of all evidence.

Unlike the civil motion for nonsuit, granting of the motion is mandatory where the government has rested without making out by its own evidence a prima facie case of defendant's guilt. "The requirement that such a (prima facie) case be made before the accused be put to his defense is one of the great safeguards in our system of justice." Bazelon, J., in Cephus v. United States, 324 F.2d 893, 895 (D.C. Cir. 1963). It is recognized that it is manifestly unfair for the government to put on a sham case, and then hope for the accused to convict himself; for if this were permitted there would be a return to the infamy of inquisatorial justice.

The facts of the Cephus case, unrelated in appellant's brief, which was cited for the proposition that ruling is "mandatory", were of an entirely different quality than those in this case. There, the accused was convicted of car theft on no more evidence than a single fingerprint found on the outside of the car's window. Ruling on a motion under Rule 29 was reserved, and the defense proceeded. The accused was convicted after the jury believed exculpatory testimony by an alleged accomplice which implicated Cephus.

Applied to the facts therefore, the holding in Cephus is properly interpreted to mean that it is mandatory to grant the motion when it does not appear that a reasonable man could find guilt beyond a reasonable doubt, based on the government's evidence alone. If there was evidence which is sufficient to present to a jury, the motion cannot lawfully be granted. The utmost care should be exercised in granting the motion, for there is currently no appeal from a judgment of acquittal. The Motion for Acquittal, A Neglected Safeguard, 70 Yale L. J. 1151 note 61 at 1161 (1961); Kepner v. United States, 195 U.S. 100 (1904); Greene v. United States, 355 U.S. 184 (1957).

Only where there is no doubt in the court's mind that the accused cannot be guilty beyond a reasonable doubt may the case be taken from a jury. Cooper v. United States, 218 F.2d 39 (D.C. Cir. 1964). Moreover, in resolving any factual ambiguities in deciding a motion under Rule 29 the court is enjoined to view the evidence in a light most favorable to the government. United States v. Frank, 151 F. Supp. 866 (D. Pa. 1957), aff'd. 245 F.2d 284, cert. denied 355 U.S. 819.

The facts in the Frank case, supra, provide a useful contrast to the Cephus case. There, as here, the accused was charged with evasion of income tax. The government's evidence was a series of bank deposits of unascertained origin the amount of which were far in excess of defendant's reported income. Motion for judgment of acquittal was made at the close of the government's case, ruling on which was reserved for the reasons

outlined above, though the evidence was indirect as it was here. 151 F. Supp. at 868. The Frank court correctly decided that the government was not required to conclusively negative every possibility that the money came from a non-taxable source, i. e., gift, loan, in order to withstand the motion (citing Holland v. United States, 348 U.S. 121 (1954)). A sufficient prima facie case was made out by showing that the money in excess of reported income had been deposited in banks. An analogous showing was made by the government in this case, and it properly was allowed to withstand the motion.

It is clear from the record that the government's evidence was of quality far exceeding a mere fingerprint. Witnesses were produced who though hostile in all cases save one testified to a complex web of transactions in which appellant received several thousand dollars. These transactions were shown to have been carried out in ways systematically calculated to befuddle the government's assessment of tax thereon. In addition, it was shown that appellant was impoverished due to heavy (non deductible, 26 U.S.C. 165d) gambling losses [R. T. 575].

In both this and the Frank case, supra, the issue was whether the transacting parties intended the payments to be income, i. e., not a gift or loan, etc., and whether there was a wilfull attempt to avoid payment of taxes due thereon. Spies, supra. Such questions can only be answered when the jury weighs evidence, and assesses credibility of witnesses. Weathers v. United States, 322 F.2d 566 (9th Cir. 1963); Rowe v. United States, 370 F.2d

240 (D. C. Cir. 1966). It is not for the court to assume these functions where there is a jury. Riggs v. United States, 280 F. 2d 949 (5th Cir. 1960). It is not a requirement that the evidence compel conviction to withstand the motion. Crawford v. United States, 375 F. 2d 332 (D. C. Cir. 1967).

It is reversible error to reserve judgment on a motion under Rule 29 only when weaknesses in the government's case make granting of the motion mandatory. In cases such as this where the motion may be lawfully denied, the court is conferring a favor on the accused by reserving judgment, agreeing in effect to stop the trial at any point when it becomes clear that the government cannot prevail. The accused should not be heard to complain of the court's magnaminity.

Where a prima facie case has been made, therefore, the considerations which led the Fifth Circuit to reverse the trial court's reservation of judgment in Jackson v. United States, 250 F. 2d 897 (5th Cir. 1958) are not present. We draw the court's attention to the special concurrence of Rives, J., 250 F. 2d at 901, substantially in accord with our analysis.

In Jackson, the Fifth Circuit assumed, citing T'Kach v. United States, 242 F. 2d 937 (5th Cir. 1957) that the introduction of evidence by the accused after denial of the motion waives any error. That court apparently analogized the motion for judgment of acquittal to the (discretionary, F. R. Civ. P. 41b) civil motion for nonsuit, 70 Yale L. J. 1151, 1158, op. cit., and concluded that error would be waived by presentation of evidence. This

would make the right to put on evidence after denial of the motion (not present in civil cases under F. R. Civ. P. 41b) meaningless, in the Jackson court's opinion. Subsequent cases have begun to make the analytical distinction between civil and criminal cases and the waiver doctrine has been qualified in certain contexts. Cephus, supra. Thus, the dilemma feared in Jackson is less than immediate.

Furthermore, the Advisory Committee on Rules did not have the waiver question in mind when Rule 29 was revised, but was rather concerned that the accused might estop himself, following the civil practice, from making a defense if a motion under Rule 29 was denied. Footnote 3 to Rule 29, 18 U.S.C.A. (1964).

The primary purpose of Rule 29.

Indeed the main purpose of a motion under Rule 29, aside from that pointed out by Judge Bazelon, is to furnish a basis for appellate review of the sufficiency of the evidence. Piccuro v. United States, 250 F.2d 585, 589 (8th Cir. 1958); Janko v. United States, 281 F.2d 156 (8th Cir. 1960). It has been held that the evidence cannot be reviewed unless the motion is made. Corbin v. United States, 253 F.2d 646 (10th Cir. 1958). This function can be amply fulfilled by a motion made at the close of all evidence which is what appellant in fact did [R. T. 766]. The effect of denial of the motion at the close of the government's case has the net effect of reserving judgment until that time, but would not be covered by the Jackson mandatory ruling doctrine. It should make no difference that the court accomplished the same result by

announcing it was doing just that.

If this Court determines there should be a right to a definative ruling on the motion when made at the close of the government's case-in-chief in all cases, despite the fact the government has made a prima facie case, an alternative reason why the trial court did not err in taking the motion under submission was that appellant did not insist on a ruling and an explicit refusal. By failing to timely object to a lack of ruling [R. T. 497], and then proceeding to introduce evidence, appellant waived the motion. United States v. Rosegarten, 357 F. 2d 263 (2nd Cir. 1960); United States v. Goldstein, 168 F. 2d 666 (2nd Cir. 1948). This is not a contradiction of Cephus, supra, for the facts did not make granting of the motion mandatory.

The motion cannot be granted at an early stage except in extraordinary cases for the reasons stated above. To hold that it must be granted in cases such as this where much of the evidence is intangible and in which all but one witness was hostile with one taking the Fifth Amendment [R. T. 499] would be a clear miscarriage of justice, as well as an overturning of settled law. Frank, supra. It would tend to allow defendants to defeat charges by a Rule 29 motion if he is able to manipulate evidence or is well enough acquainted with the witnesses as to be able to color their testimony to a sufficient degree. The District Court did not err in reserving judgment.

B. THE DISMISSAL OF THE JURY FOR THE NIGHT BY THE TRIAL COURT DID NOT CONSTITUTE REVERSIBLE ERROR UNDER THE CIRCUMSTANCES.

On June 13, 1967 at 4:45 P. M., after the jury had deliberated for approximately two and one half hours, Court reconvened, and over no objection the jury was duly admonished and separated for the evening and instructed to return to the jury room at 9:30 A. M. the following morning [R. T. 869]. Appellant contends that because of this, his conviction must be overturned. The government does not agree.

It is incontestable that a jury must be protected from improper outside influences during its deliberations. However, it does not follow that the only way to accomplish this end is the closeting of jurors. In the case of United States v. D'Antonio, 342 F.2d 667 (7th Cir. 1965), upon which appellant chiefly relies, the accused's conviction for theft was reversed after the trial court allowed the jury to separate for the night with admonition delivered by a U. S. Marshal. In addition to primarily denouncing the delegation of judicial duty to a Marshal, the Seventh Circuit opined that historically, it has been a right for a defendant to have his case decided by a jury whose deliberations are uninterrupted by separation prior to reaching a verdict.

Dissenting, Swygert, J., interpreted the court as holding that under no circumstances may a jury be permitted to separate for the night. He astutely noted the majority's failure to deal

adequately with the case of Lucas v. United States, 275 U.S. 405 (8th Cir. 1921). There, the Marshal allowed the jury to separate when he was unable to find adequate quarters for them. The court held this not to be prejudicial error since there was good reason for the separation. The D'Antonio majority cited and approved of Lucas. What the Seventh Circuit failed to do was consider how the separation in the instant case was more likely to lead to prejudicial influence on the jury than in Lucas.

The D'Antonio court also distinguished the case of Holt v. United States, 218 U.S. 245 (1910), which held that separation during the trial, i.e., before deliberations began, was permissible. It was said that this did not authorize separation during the "final and critical phase of the jury's service", 342 F.2d at 669. The court went on to say that a trial judge can manipulate the timing of a trial to an extent that separation can usually be avoided. Thus it is suggested that the court should have adjourned at the close of arguments and reconvened the next day to charge the jury.

Can it be said that a jury is somehow less susceptible to outside influence if it goes home at the close of evidence but before charge than it would be if it had gone home after being charged? If anything, the reverse is true, for, after having been charged the jury has at least had the benefit of an interpretation of the case by an impartial and learned judge, which would surely aid jurors in warding off any importunements from uninformed outsiders. Without a charge, they are at the mercy of their own inexperience. Thus, D'Antonio has a self-defeating effect, if its

goal is to protect jurors from being biased through outside contacts. We submit that another line of analysis should be employed to reach a sound decision on this issue, which is proposed below. "History" should not be blindly followed when there is no reason to do so.

In the case of Cavness v. United States, 187 F.2d 719 (9th Cir. 1951), the error complained of was that a juror had been permitted to leave the deliberations to make a telephone call, in the company of a U. S. Marshal. In response to these urgings, this Court stated that the separation of a jury in such a way as to expose it to tampering or improper influence is reversible error (emphasis added). The court went on to say that private communication between a juror and third person is error, but not reversible if it appears that no prejudice resulted unless, as a matter of policy prejudice must be conclusively presumed; as where irregularity has tainted the panel with any sort of corruption or coercion. It was felt that when the juror took his oath, he was entitled to the presumption that he had performed his duties faithfully, and that an appellate court should be slow to impute disregard of these obligations to a juror.

Moreover, the court did not think it important that the juror may have received some casual communication from a third party about the case, for the reason that any irresponsible views that might have been so proposed would not survive the independent evaluation of the other eleven. We do not think the fact that the juror was in the company of a Marshal was determinative, as

appellant suggests, for the Marshal was not supervising the telephone conversation.

It is our opinion that this Court has adopted a view, much more complimentary to the character and intelligence of jurors, which is contrary to the historical, anachronistic assumptions which guided the D'Antonio court and which are urged here by appellant. Cavness, supra. These assumptions hold that there must be a presumption of prejudice where there has been any outside contact. They are a part of a tradition which formerly required jurors not only to be isolated, but to fast until a verdict was reached. Stone v. United States, 113 F. 2d 70 (6th Cir. 1940). Only where there has been a compromise of the jury's independence should there be concern. It is to be hoped that the trend away from such attitudes will continue.

The trend that we suggest has been adopted by many federal courts, including several which flatly contract appellant's main case. In Carter v. United States, 252 F. 2d 608 (D. C. Cir. 1958) it was expressly held that separation is permissible as long as the court takes appropriate precaution to see there is no undue influence exerted during the separation. In Wheeler v. United States, 165 F. 2d 225 (D. C. Cir. 1947), cert. denied 333 U. S. 829 (1948), it was held to be within the court's discretion to permit separation and not reviewable unless actual prejudice was shown.

The case of Hines v. United States, 365 F. 2d 649 (10th Cir. 1966), exactly adopts this position, and contradicts the D'Antonio case. As here, the jury was allowed to go home for the night

after deliberations had begun, and this was urged on the Court of Appeals as error. In response, it was held that the trial court has the full discretion to allow the jury to separate, in the absence of a showing of actual prejudice or circumstances from which prejudice might arise. The jury must of course be protected by the court by keeping it under varying degrees of seclusion. Presumably, the appropriate degree of seclusion depends on the circumstances surrounding the case.

The government does not hesitate to concede that in a trial of a notorious crime, in which there is widespread community concern due to press coverage, or where a particular person or group may feel that its interests require a particular result at any cost, that seclusion of the jury may be required in the interest of justice. We assume that such circumstances are what the Tenth Circuit had in mind by "circumstances from which prejudice may arise".

There are of course thousands of felony jury trials each year. To require that in each of these trials, whatever the outside circumstances, jurors must be closeted as public expense each night until a verdict is reached would place an onerous burden on the public treasury and the convenience of all concerned.

In this case, counsel at no time has suggested that the jury was in fact importuned, or that publicity or other factors created a climate in which improper pressures on the jury were likely. Therefore, the best view of appellant's arguments is that they are merely technical, and should not be the basis of reversal

where guilt was otherwise satisfactorily demonstrated.

The court may be concerned with certain problems which the Hines case may be thought to create, if a jury is allowed to go home for the evening, and there is no obligation (there was none in this case) that prejudicial communications were offered to jurors. The New York Court of Appeals has dealt with this problem in the case of People v. Genovese, 10 N.Y.2d 461 (1962). There, articles appeared in local newspapers alleging that the defendant was a person of low repute and a gangster. It was determined that the effect of such communications could be adequately ascertained on motion for a mistrial by the court polling each juror, and asking him if the articles had in any way affected his ability to decide the case on the sole basis of the evidence in court. Consistent with the sound policy of respect for the integrity of jurors announced by this Court in Cavness, supra, the New York Court felt that the solemn word of jurors in answer to such questions should be accepted.

Finally, appellant urges that his failure to raise issues of the possible impropriety of sending the jury home or to allege actual or presumptive prejudice below does not foreclose him from arguing them before this Court de novo. We assert that waiver may be implied by silence in this case. Counsel was not faced with an issue of impossible complexity, but one of common sense. If there was a danger of prejudice, reasonably competent counsel can be expected to have recognized same, and brought it to the trial court's attention. It is the trial court which is directly in

contact with the factual circumstances of the case, and that court should have been presented the opportunity to consider the issue, if indeed there was one. There has been no known case on this particular, narrow point. However, an analogy can be made to cases in other areas involving waiver by silence.

These cases express a concern for the rights of criminal defendants, which may be lost because of the defendant's ignorance of law. The solution found by the courts has been to insure that such a person has the aid of a lawyer at every stage of the case, including interrogation. Miranda v. Arizona, 348 U.S. 436 (1966). Once assisted by counsel, waiver may be made. These considerations do not apply to situations involving the conduct and strategy of lawyers in open court, for they presumably know the law and are immune from being overborne into throwing their rights away.

As we have made clear, however, whether there was a waiver or not is immaterial to the result, for appellant's contentions are not sufficiently compelling to warrant a reversal and retrial, with all the expense and inconvenience that implies.

C. NO PART OF THE SO-CALLED ALLEN INSTRUCTION IS SLANTED IN FAVOR OF THE PROSECUTION, AND UNDER NO THEORY IS FAILURE TO RECITE THE WHOLE OF SAID INSTRUCTION PREJUDICIAL TO THE DEFENDANT.

If the appellants other contentions are insubstantial, his arguments surrounding the so-called "Allen Instruction" (taken

from Mathes & Devitt §15.16) are utterly frivolous. Rather than consume the court's time with unnecessary pages of legal prose, we adopt the expedient of incorporating the entire part of the instruction which the court did read to the jury. It will become clear that contrary to appellant's veiled suggestion, the first part is not slanted toward the government, and the omitted portions are not needed to balance it; indeed for the most part they merely restate what was said before. The court had previously fully informed the jury of the presumption of innocence [C. T. 842, 843, 846, 854].

[R. T. 879] "§15.16 Supplemental Instruction - When Jurors Fail to Agree Seasonably

> "The Court wishes to suggest a few thoughts which you may desire to consider in your deliberations, along with the evidence in the case, and all the instructions previously given.
>
> "This is an important case. The trial has been expensive in time, and effort, and money, to both the defense and the prosecution. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of sometime. There appears no reason to believe that another trial would not be costly to both sides. Nor does there appear any reason to believe that the case can be tried again, by either side, better or more exhaustively than it has been tried before

you. Any future jury must be selected in the same manner and from the same source as you have been chosen. So, there appears no reason to believe that the case would ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or that more or clearer evidence could be produced on behalf of either side.

"Of course these things suggest themselves, upon brief reflection, to all of us who have sat through this trial. The only reason they are mentioned now is because some of them may have escaped your attention, which must have been fully occupied up to this time in reviewing the evidence in the case. They are matters which, along with other and perhaps more obvious ones, remind us how desirable it is that you unanimously agree upon a verdict.

"As stated in the instructions given at the time the case was submitted to you for decision, you should not surrender your honest convictions as to the weight or effect of evidence, solely because of the opinion of other jurors, or for the mere purpose of returning a verdict.

"However, it is your duty as jurors to consult with one another, and to deliberate with a

view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence in the case with your fellow jurors. And in the course of your deliberations, you should not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous.

"In order to bring twelve minds to an unanimous result, your must examine the questions submitted to you with candor and frankness, and with proper deference to and regard for the opinions of each other. That is to say, in conferring together, each of you should pay due attention and respect to the views of the others, and listen to each other's arguments with a disposition to reexamine your own views.

"If much the greater number of you are for a conviction, each dissenting juror ought to consider whether a doubt in his or her own mind is a reasonable one, since it makes no effective impression upon the minds of so many equally honest, equally conscientious fellow jurors, who bear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire

to arrive at the truth. On the other hand, if a majority or even a lesser number of you are for acquittal, other jurors ought seriously to ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment, which is not concurred in by many of their fellow jurors, and whether they should not distrust the weight and sufficiency of evidence, which fails to convince the minds of several of their fellows to a moral certainty and beyond a reasonable doubt.

"You are not partisans. You are judges -- judges of the facts. Your sole interest here is to ascertain the truth from the evidence in the case. You are the exclusive judges of the credibility of all the witnesses, and of the weight and effect of all the evidence. In the performance of this high duty, you are at liberty disregard all comments of both court and counsel, including of course the remarks I am now making.

"Remember, at all times, that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that, after full deliberation and consideration of all the evidence in the case, it is your duty to agree upon a verdict, if you can do so without

violating your individual judgment and your conscience."

Supplemental instructions of the kind and tenor as given in the instant case have by long standing practice been approved since the decision of the United States Supreme Court in Allen v. United States, 164 U.S. 492 (1896). The use of various permutations of this instruction has been attacked on the theory that such an instruction coerced dissenting jurors to compromise their views for the sake of agreement. However, as we point out the words used by Judge Curtis reminded the jury of their duty to dissent if in their best judgment it was appropriate.

A holding which flatly disapproves of the Allen Instruction would result in a greater number of cases having to be retried as a result of jurors' reluctance to reach a decision in complicated cases. This would create a climate which is inconducive to the cause of speedy, efficient justice. Furthermore, such a holding would be unfair to defendants, in that many are ill prepared to bear the expense of a second trial. The government, on the other hand, can well afford any number of trials.

The attacks on the Allen instruction have been specifically repudiated by the Ninth Circuit in the following cases: Henry v. United States, 361 F.2d 352 (9th Cir. 1966); Christy v. United States, 261 F.2d 357 (9th Cir. 1958), cert. denied 360 U.S. 919, reh'g. denied 361 U.S. 857; Hutson v. United States, 238 F.2d 167 (9th Cir. 1956); United States v. Kawikata, 190 F.2d 506 (9th Cir. 1951), aff'd 343 U.S. 717.

The appellant cites the case of Berger v. United States, 62 F.2d 438 (10th Cir. 1938) for the proposition that readmonition as to the presumption of innocence is necessary to balance the possible "coercive" effects of a supplemental charge. Appellant fails to be candid with this Court in not disclosing that what was required to be balanced there was not the same as that suggested in this case. In Berger the court first wrongfully asked the jury how it was divided. Then, in an air of coercion against the dissenters, gave the following charge: "This is a very important case. The evidence is very simple and very clear, and there is not much of it. The government is at much expense in this case, spending all this time bringing all these witnesses." 62 F.2d at 438.

It is easy to see how such a statement would have to be balanced by a strong reminder of the presumption of innocence, for it amounts to almost an order to the dissenters to convict. Taking these facts into account, it cannot be said that the case stands for the proposition that supplemental charges are inherently coercive, as appellant suggests.

Finally, we would note that in United States v. Allis, 73 Fed. 167 (Circuit Court E.D. Kan. 1893), which appellant cites as an example of a charge which properly safeguarded the rights of a defendant, the charge given was in substance identical to that given by Judge Curtis here. It did NOT contain the language omitted, or anything resembling it.

D. THERE WAS AMPLE EVIDENCE OF REQUISITE INTENT TO AVOID PAYMENT OF TAX AND THE JURY WAS FULLY JUSTIFIED IN FINDING GUILT.

The government is in full agreement with appellant in his application of Holland v. United States, 348 U.S. 121 (1954) that in addition to non-payment of tax, the final element of wilfulness to evade tax must be shown, which cannot be inferred from a mere understatement of income.

We are in further agreement that wilfullness involves a specific intent which must be proved by independent evidence, that wilfullness involves a state of mind, and that direct proof of wilfullness is seldom available. Since it is to be assumed that Congress did not enact self-defeating legislation, the question then becomes what kind of independent evidence may be used to show the requisite state of mind.

Appellant has correctly stated that a consistent pattern of under-reporting of income or over-claiming deductions, and not recording such items on the taxpayer's records is evidence from which wilfullness may be inferred. Blackwell v. United States, 244 F.2d 423, 429 (8th Cir. 1957). This meshes perfectly with the failure to keep records of the mostly cash transactions here. Wilfull intent may be inferred from the acts of the parties and such inference may arise from a combination of acts although each act standing by itself may seem unimportant. It is a question of fact to be determined from all the circumstances. Battjes v. United

States, 172 F.2d 1, 5 (6th Cir. 1949). Affirmative, wilfull attempt may be inferred from . . . any conduct, the likely effect of which would be to mislead or conceal. The failure by experienced businessmen to demand notes or keep records of "loans" even if personal can only be explained in this way.

It may have been of no consequence for the purposes of §7201 that appellant received a single sum of money from one individual as a "loan" or "gift" and did not pay it back. Even a series of such transactions over time with one individual may be of dubious import for purposes of the section. However, a series of transactions involving thousands of dollars paid to appellant by several people with whom appellant was acquainted in a commercial, business context and with whom appellant had carried on business transactions has no other explanation than that the money was paid for services rendered. This was indeed a general pattern of conduct by appellant from which the jury could infer the requisite intent. Remmer v. United States, 205 F.2d 277, 288 (9th Cir. 1953). Of course the question before this Court is whether a jury could infer the requisite intent; the weighing of evidence and making of findings is the job of the jury.

"Wilfully" means more than intentionally or voluntarily in the sense that in addition to knowing one is not paying tax on certain monies one must know that a tax is properly due. If one thinks a tax is not due, under however erroneous a notion of the law, §7201 has not been violated.

Appellant, who appears highly intelligent and knowledgeable

in business can hardly claim that he did not know there is no obligation to pay income tax on money received for services rendered in a business transaction. Not having been excluded by Congress, kickbacks are income. It is immaterial that the payors of kickbacks sought to conceal the fact that they were engaged in such conduct by characterizing the payments as loans or gifts in fear of the sanctions of the Packers and Stockyards Act, 7 U.S.C. §181 ff (1964). Only the intent of the taxpayer is at issue.

Once a pattern of payments has been established it is clearly a question for the jury whether there was a wilfull attempt to evade tax due thereon. This is so despite the possibility of a bona fide misconception of law. Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953), cited by appellant, specifically so held. None of appellant's other cases disturb this conclusion.

In Holland v. United States, 348 U.S. 121 (1964), there was a prosecution for evasion of tax based on unexplained increases in net worth of the taxpayer. The government introduced evidence of a likely taxable source of these increases, as it did here. It was held that the fact that the government did not negative the possibility that the money came from non-taxable sources was not fatal to conviction. The analogy to the facts of this case is simple and clear. It is up to the government to show a clear possibility of taxable payments, and up to the jury to determine if the possibility is a reality. The fact that appellant was unable to make his own case by negating taxability reinforces the inference of guilt. That he was acquitted on the first two counts of the indictment

shows that the jury did in fact give him the benefit of every possible doubt, refusing to convict him for years in which his pattern of behavior had not become firmly entrenched.

Finally, we would note that since the gist of the offense in §7201 is attempt to evade tax, it is not necessary for the government to show the exact amount of the tax due, or success in actually evading the tax. United States v. Norris, 205 F. 2d 828 (2nd Cir. 1953). Therefore, if in any year all but one of the payments received by appellant was in fact a loan, but the one remaining payment was income, conviction could be had. This affords the widest range of safety to the government's case, as the jury would be justified in convicting even if it disbelieved most of the government's evidence.

The government was able to paint an elaborate picture of a string of kickbacks paid to appellant, who had a reputation for taking more such payments than anyone in the industry. He introduced no substantial evidence to the contrary but confined himself to making weak attacks on the soundness of the prosecution's case and witnesses. Appellant's strong desire to be free of the burden of his conviction is understandable. However, he has put forward nothing that would warrant a court of law to grant the relief sought. The evidence was sufficient to sustain a conviction.

CONCLUSION

Based on the facts presented, the court below was fully justified in convicting the appellant. The procedural points raised by appellant are insubstantial and at times approach the frivolous. Therefore, the District Court's judgment must be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jo Ann Dunne
JO ANN DUNNE